

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE:

MARTIN JAMES DEKOM, SR.,

Debtor.

CASE NO.: 19-30082-KKS
CHAPTER: 13

FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT
OF DENIAL OF CONFIRMATION OF DEBTOR'S SIXTH AMENDED
PLAN AND GRANT OF STAY RELIEF TO NATIONSTAR
MORTGAGE, LLC d/b/a MR. COOPER

THIS CASE came before the Court for a final evidentiary hearing on February 12, 2020 on confirmation of Debtor's Sixth Amended Plan ("Sixth Plan," Doc. 244), the *Amended Motion for Relief from Automatic Stay* ("Stay Relief Motion," Doc. 118) filed by Nationstar Mortgage, LLC d/b/a Mr. Cooper ("Nationstar"), and all related objections and responses.

Appearing at the hearing were Debtor, Martin James Dekom, Sr.; counsel for Nationstar, Elizabeth Eckhart; and counsel for the standing Chapter 13 Trustee ("Trustee"), William Miller. During the hearing the Court received documentary evidence offered by Nationstar and live testimony of Debtor and Nationstar's Litigation Ambassador, Mr. Grant LaClave, and heard argument of Debtor and counsel to Nationstar and

the Trustee. At the conclusion of the hearing the Court took the matters under advisement.

JURISDICTION

This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A), (L), and (O), and the Court has jurisdiction under 28 U.S.C. § 1334 and the District Court's Standing Order of Reference dated June 5, 2012. This ruling constitutes findings of fact and conclusions of law as to confirmation of Debtor's Sixth Plan and Nationstar's Stay Relief Motion.¹

BACKGROUND²

This case is a two-party dispute between Debtor and Nationstar. Nationstar holds a final judgment of foreclosure ("Foreclosure Judgment") on Debtor's only real property: a parcel of residential real property in Manhasset, Nassau County, New York (the "Property"). Debtor and Nationstar have been embroiled in litigation over the Property and the Foreclosure Judgment since 2013. For purposes of confirmation and stay relief, Debtor and Nationstar agreed that the value

¹ Fed. R. Bankr. P. 7052 made applicable by Fed. R. Bankr. P. 9014(c).

² The Court repeats here the relevant background of this case from a prior order containing citations to the record: *Order Denying Debtor's Notice and Motion to Stay Pending Appeal*, Doc. 268.

of the Property is \$800,000, as assessed in Nationstar's Broker's Price Opinion.³

Nationstar's Foreclosure Judgment was entered by a New York trial court in 2014 and affirmed on appeal in 2018.⁴ Since 2011 Debtor has not made a payment to Nationstar or paid taxes or insurance on the Property.

During this case Debtor has filed three documents objecting to Nationstar's claim ("Objections").⁵ Debtor's arguments in the Objections are the same as in his objection to Nationstar's Stay Relief Motion: that Nationstar's Foreclosure Judgment is not final; and that this Court should revisit the validity of the documents underlying the Foreclosure Judgment, the amount of Nationstar's claim, and Nationstar's standing to appear in this case.⁶ Debtor also asserts that based on the record and the agreed value of the Property, there is equity in the Property over and above Nationstar's claim.

³ Docs. 133-1, 203, 269 and 270.

⁴ The facts surrounding Nationstar's Foreclosure Judgment are set forth in detail in this Court's *Order Overruling, In Part, Debtor's Objections to Claim of Nationstar (Docs. 63, 76 and 158)*, Doc. 237. Despite the record in the foreclosure case, Debtor still claims the Final Judgment is not final.

⁵ Docs. 63, 76, and 158.

⁶ Doc. 129.

PROCEDURAL HISTORY

Debtor filed his first Chapter 13 in New York in August of 2018.⁷ After that case was dismissed in November of 2018, Debtor filed the Chapter 13 Petition commencing this case and his first Chapter 13 Plan on January 23, 2019; he was represented by an attorney at that time.⁸ After differences between Debtor and his attorney arose, the Court permitted Debtor's attorney to withdraw by Order dated August 27, 2019.⁹ Debtor has been proceeding *pro se* since that date.

The Trustee and Nationstar filed objections to Debtor's first Chapter 13 plan in March of 2019.¹⁰ Prior to the continued confirmation hearing scheduled to take place on June 6, 2019, Debtor filed his first and second amended Chapter 13 plans to which the Trustee filed objections.¹¹ Confirmation was then continued to August 14, 2019.¹² Meanwhile, the Trustee filed a Motion to Dismiss to which Debtor objected.¹³

⁷ Doc. 12.

⁸ Docs. 1 and 2.

⁹ Doc. 48.

¹⁰ Docs. 16 and 17.

¹¹ *Chapter 13 Plan – First Amended*, Doc. 20; *Chapter 13 Trustee's Objection(s) to Confirmation of First Amended Chapter 13 Plan*, Doc. 22; *Chapter 13 Plan – Second Amended*, Doc. 23; and *Chapter 13 Trustee's Objection(s) to Confirmation of Second Amended Chapter 13 Plan*, Doc. 24.

¹² Doc. 26.

¹³ *Chapter 13 Trustee's Motion to Dismiss*, Doc. 25 and *Debtor's Objection to Trustee's Motion to Dismiss*, Doc. 28.

Approximately one month later, the Trustee withdrew the Motion to Dismiss.¹⁴ Debtor's third, fourth, fifth and sixth amended plans followed.¹⁵

On August 21, 2019, Nationstar filed its initial motion for relief from stay which the Court set for preliminary hearing on October 3, 2019.¹⁶ On the eve of that hearing and in response to Debtor's objection to the Stay Relief Motion, Nationstar filed a Reply asserting for the first time that it held a Foreclosure Judgment.¹⁷ At the October 3 hearing the Court granted Nationstar leave to file an amended stay relief motion, gave Debtor additional time within to respond to any amended motion and continued the preliminary hearing.¹⁸

Nationstar timely filed its amended Stay Relief Motion and Court rescheduled the preliminary hearing for January 22, 2019.¹⁹ After the Court denied Debtor's motion to strike Nationstar's amended Stay Relief Motion, Debtor filed an amended objection to Nationstar's request for

¹⁴ Doc. 33.

¹⁵ Docs. 30, 56, 62 and 244.

¹⁶ Docs. 45 and 70.

¹⁷ Doc. 84. Attached to the Reply is a copy of the Final Judgment.

¹⁸ Doc. 91.

¹⁹ Docs. 118 and 141. At the January 22 hearing the Court granted the Stay Relief Motion, in part, to allow the parties to seek resolution of a motion for leave to appeal that Debtor had filed with the Court of Appeals for the State of New York on November 5, 2018. Doc. 233.

stay relief.²⁰ Ultimately, the Court scheduled an evidentiary hearing on the Amended Stay Relief Motion on February 12, 2020, in conjunction with the final evidentiary hearing on confirmation and other matters.²¹

The Sixth Plan

Debtor's Sixth Plan, as it relates to Nationstar and the Property, proposes no payments to Nationstar or the Trustee for twenty-three (23) months from the date of confirmation, during which Debtor plans to market the property himself using Zillow.com ("Zillow"). During the life of the plan and prior to some possible future sale, Debtor proposes to continue using and enjoying the Property; he testified at the hearing that during this time Nationstar should continue advancing money with which to pay taxes on and insure the Property. In month twenty-four (24) of the Sixth Plan, Nationstar is to receive a lump sum payment of \$544,411.15, provided that all disputes between it and Debtor have been finally concluded.²² Assuming a sale of the Property, if the litigation between Debtor and Nationstar remains ongoing, Debtor proposes that the sale proceeds, up to a maximum of \$600,000, be "paid into court"

²⁰ Docs. 92, 150 and 151.

²¹ Doc. 234.

²² Doc. 244, pp. 1 and 4.

rather than to Nationstar or the Trustee.²³ The surplus from the sale of the Property over and above the amount allocated to Nationstar's claim is to be paid to Debtor.²⁴

Duties of the Debtor Order

Shortly after Debtor commenced this case the Court entered its standard Chapter 13 "Duties of the Debtor" order that provides, in relevant part,

Pending confirmation of a plan, as a condition of the use of property of the estate that is subject to a security interest, the Debtor shall comply with the following which, taken collectively, shall constitute adequate protection for each secured claim as required by 11 U.S.C. §1326:

(a) *The Debtor shall:*

i. *File and serve a plan that conforms to the Court's form plan* no later than fourteen (14) days from the date of filing of the Chapter 13 petition; and

ii. *File Notice(s) of Adequate Protection Payments in accordance with this Court's Chapter 13 Standing Order and serve a copy on the Trustee and each affected creditor . . .*²⁵

²³ *Id.* at p. 4. The Sixth Plan anticipates that Debtor may continue litigating Nationstar's claim for up to two years post-confirmation: the plan provides that in month 24 if Debtor's dispute with Nationstar has not been resolved the sum of \$600,000 will be set aside; that amount is designed to pay Nationstar \$544,411.15 plus two years' interest at 4.5% and post-petition fees, if any, to be determined by the Court. *Id.* at pp. 3-4.

²⁴ Doc. 244, p. 4.

²⁵ *Order Establishing Duties of the Debtor and Chapter 13 Trustee, Adequate Protection Or Secured Claims, Allowance of Administrative Expenses and Confirmation Procedures*, Doc. 11, ¶ 5(a) (emphasis added).

In her Motion to Dismiss and Objections to Confirmation the Trustee correctly asserts that Debtor is in violation of the Duties of the Debtor Order in two respects: 1) to date, Debtor has not filed or served a Notice of Adequate Protection in favor of Nationstar, and 2) Debtor's Sixth Plan fails to conform to the Court's approved Chapter 13 form plan, despite Debtor's certification to the contrary.²⁶ In response, Debtor maintains, in error, that the requirement to file Notices of Adequate Protection applies only to creditors whose claims are secured by personal property.²⁷ As to whether the Sixth Plan conforms to the Court's approved Chapter 13 form plan, Debtor maintains that it does. But it does not.

In the body of the Sixth Plan Debtor avows: **"By filing this document, the debtor, if not represented by an attorney . . . certifies that the wording and order of the provisions in this Chapter 13 Plan are identical to those contained in the Official form adopted by this Court effective on the date of signing"**²⁸ Nonetheless, the Sixth Plan deviates from this Court's approved form by: providing that Debtor will avoid Nationstar's lien even though it is based on a purchase-money

²⁶Docs. 263 and 279.

²⁷ Doc. 269, p. 3.

²⁸ Doc. 244, p. 4 (emphasis in original).

mortgage; failing to provide that the automatic stay terminates upon entry of the order confirming the plan as to the *in rem* rights of creditors whose claims are being paid directly by Debtor; and omitting from Part 5.1 the provision that provides for payment of interest on unsecured claims.²⁹

THE EVIDENCE

Debtor testified about the Property in detail at the hearing. According to Debtor, neither he nor his family reside in the Property, which is vacant. Debtor has not hired, and has no intention to hire, a realtor to market the Property. There is no “for sale” sign on the Property. As of the hearing date, no party had requested to see the Property and Debtor had not shown the Property to a single prospective buyer.

Debtor first listed the Property for rent on Zillow in March of 2019 at \$4,000 per month. Several days later, he reduced the monthly rent to \$3,100. In April of 2019 Debtor removed the rental listing from Zillow altogether.

Debtor listed the Property for sale on Zillow in May of 2019, priced at \$950,000, despite having listed the value of the Property as \$750,000

²⁹ Compare Doc. 244 with United States Courts, *Official Form 113 – Chapter 13 Plan*, https://www.uscourts.gov/sites/default/files/b_113_1217_0.pdf (last visited April 2, 2020).

on his Schedule A in January 2019.³⁰ On or about December 31, 2019, in response to Nationstar's and the Trustee's objections to confirmation, Debtor reduced the Property's list price on Zillow from \$950,000 to \$872,000.³¹

In defiance of this and other courts' rulings to the contrary, Debtor still maintains and testified that "there is no final judgment" in favor of Nationstar.³² He also testified that he plans to continue challenging "pretty much all" aspects of Nationstar's claim during this Chapter 13 case, even after the Property sells.

Nationstar's representative, Mr. LaClave, also testified at the hearing. His unrefuted testimony was that Nationstar's claim as of the hearing date totaled \$573,640.08, comprised of principal of \$358,507.19, interest of \$124,171.09, escrow advances of \$69,991.10 and "corporate" advances of \$20,970.70. Mr. LaClave re-confirmed that Debtor has not made a payment since 2011, and that Nationstar has advanced sums for insurance and property taxes since 2011.

³⁰ Doc. 1, p. 11.

³¹ Doc. 269.

³² See Docs. 219, 237 and 268.

DISCUSSION

Confirmation

Confirmation of a Chapter 13 Plan is governed by 11 U.S.C. § 1325. Subsection (a) of Section 1325 provides that to confirm a plan the Court must find, among other things, that: “. . . (3) the plan has been proposed in good faith . . . (6) the debtor will be able to make all payments under the plan and to comply with the plan [i.e., that the plan is feasible]; and (7) the action of the debtor in filing the petition was in good faith.”³³ Subsection (b) of Section 1325 provides, in pertinent part, that if the Chapter 13 Trustee objects to confirmation, the debtor must devote all of his or her net disposable income to the plan during the commitment period.³⁴

Debtor did not file his Petition nor is he seeking confirmation of the Sixth Plan in good faith.

In his opening and closing statements, counsel for the Trustee urged the Court not only to listen to Debtor’s testimony, but also to focus on Debtor’s intent in seeking confirmation of the Sixth Plan. Having done

³³ 11 U.S.C. §§ 1325(a)(3), (6) and (7) (2020).

³⁴ 11 U.S.C. § 1325(b)(1) (2020).

so, the Court finds that Debtor did not file his Petition and is not seeking confirmation of the Sixth Plan in good faith.

When Congress amended the Bankruptcy Code in 2005 by enacting the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), it added subsection (7) to 11 U.S.C. § 1325(a), which requires the Court to find that “the action of the debtor in filing the petition was in good faith.”³⁵ In determining good or bad faith, bankruptcy courts have looked to the totality of the facts and circumstances, keeping in mind the purpose of the Bankruptcy Code, which is “to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the bankruptcy process in order to avoid paying their debts.”³⁶

“Good faith” is not defined in the Bankruptcy Code. In *Black’s Law Dictionary*, “good faith” is defined as “a state of mind consisting in (1) honesty in belief or purpose (4) absence of intent to defraud or to seek unconscionable advantage.”³⁷ Similarly, “bad faith” or “bad faith filing” is not defined in the Bankruptcy Code. A “bad-faith filing” is

³⁵ 11 U.S.C. § 1325(a)(7) (2006).

³⁶ *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218, 220 (8th Cir. 1996) (citing *Graven v. Fink (In re Graven)*, 936 F.2d 378, 385 (8th Cir. 1991)).

³⁷ *Good Faith*, *Black’s Law Dictionary* (11th ed. 2019).

defined in *Black's Law Dictionary* as “[t]he act of submitting a bankruptcy petition that is inconsistent with the purposes of the Bankruptcy Code or is an abuse of the bankruptcy system (that is, by not being filed in good faith).”³⁸

The Eleventh Circuit Court of Appeals has set forth a totality of the circumstance approach which includes eleven (11) non-exhaustive factors to be considered by bankruptcy courts in determining whether a Chapter 13 plan is proposed in good faith:

(1) the amount of the debtor’s income from all sources; (2) the living expenses of the debtor and his dependents; (3) the amount of attorney’s fees; (4) the probable or expected duration of the debtor’s Chapter 13 plan; (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13; (6) the debtor’s degree of effort; (7) the debtor’s ability to earn and the likelihood of fluctuation in his earnings; (8) special circumstances such as inordinate medical expense; (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors; (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors; (11) the burden which the plan’s administration would place on the trustee.³⁹

Primary among these factors and most relevant to the case at hand are the Debtor’s motivation to prolong litigation against Nationstar and

³⁸ *Bad-Faith Filing*, *Black's Law Dictionary* (11th ed. 2019).

³⁹ *Kitchens v. Georgia R.R. Bank and Trust Co. (In re Kitchens)*, 702 F.2d 885, 888-89 (11th Cir. 1983).

perceptible insincerity in seeking Chapter 13 relief, his lack of sincere effort towards selling the Property or confirming a plan, and his lack of bona fides in dealing with his primary creditor, Nationstar.⁴⁰

The Eleventh Circuit has said that,

[W]henver a Chapter 13 petition appears to be tainted with a questionable purpose, it is incumbent upon the bankruptcy courts to examine and question the debtor's motives. If the court discovers unmistakable manifestations of bad faith . . . confirmation must be denied.

Unmistakable manifestations of bad faith need not be based upon a finding of actual fraud, requiring proof of malice, scienter or an intent to defraud. We simply require that the bankruptcy courts preserve the integrity of the bankruptcy process by refusing to condone its abuse.⁴¹

Courts in Florida have found bad faith where facts indicate that the purpose of the debtor's bankruptcy filing was the avoidance of a pre-bankruptcy judgment, including a foreclosure judgment.⁴² As evidence of such bad faith, this Court and others have found telling that: (a) the bankruptcy filing followed an adverse judgment that, compared to other creditors' claims, rendered the bankruptcy effectively a two-party

⁴⁰ *Id.*

⁴¹ *Shell Oil Co. v. Waldron (In re Waldron)*, 785 F.2d 936, 941 (11th Cir. 1986) (reversed confirmation of Chapter 13 plan where the debtors' sole motivation in filing was to avoid an option agreement).

⁴² *In re Kollar*, 357 B.R. 657, 660 (Bankr. M.D. Fla. 2006); *Matter of Hamilton*, 51 B.R. 550, 554 (Bankr. M.D. Fla. 1985).

dispute;⁴³ (b) the debtor has engaged in extensive prepetition litigation as to the validity of the principal obligation, especially in multiple jurisdictions and on procedural or otherwise non-substantive grounds;⁴⁴ (c) the debtor has failed to file a viable plan;⁴⁵ and (d) the debtor is a repeat filer, or has made threats of bankruptcy or engaged in other prepetition conduct indicating an unwillingness to honor what becomes the primary obligation in bankruptcy.⁴⁶

The Supreme Court has stated:

[A] central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. But in the same breath that we have invoked this fresh start policy, we have been careful to explain that

⁴³ *In re Weiser*, 391 B.R. 902, 909 (Bankr. S.D. Fla. 2008); *In re Haque*, 334 B.R. 486, 490 (Bankr. D. Mass. 2005); *In re Reese*, 281 B.R. 735, 741 (Bankr. M.D. Fla. 2002); *In re Wilson*, 168 B.R. 260, 262 (Bankr. N.D. Fla. 1994); *In re Norman*, 162 B.R. 581, 583 (Bankr. M.D. Fla. 1993); *Matter of Hamilton*, 51 B.R. 550, 554 (Bankr. M.D. Fla. 1985) (“if the sole purpose of filing is to frustrate the right of a secured creditor to enforce a mortgage, the plan is not proposed in good faith.”).

⁴⁴ *See Carr v. U.S. Bank as Trustee for TBW Mortgage Backed Trust Series 2006-6*, 793 Fed. Appx. 971 (11th Cir. 2019); *In re Banks*, 248 B.R. 799, 804 (B.A.P. 8th Cir. 2000), *aff’d*, 267 F.3d 875 (8th Cir. 2001); *In re Klisivitch*, Case No.: 2:19-cv-5-FtM-29, 2019 WL 3082580, at *6 (M.D. Fla. July 15, 2019); *In re Vick*, 327 B.R. 477 (Bankr. M.D. Fla. 2005) *subsequently dismissed*, 233 F. App’x 897 (11th Cir. 2007).

⁴⁵ *In re Barberena*, No. 08-14946-B-13, 2009 WL 330248, at *4 (Bankr. E.D. Cal. Jan. 28, 2009); *In re Norman*, 162 B.R. 581, 583 (Bankr. M.D. Fla. 1993).

⁴⁶ *Matter of Love*, 957 F.2d 1350, 1357 (7th Cir. 1992); *In re McGovern*, 297 B.R. 650, 659-661 (S.D. Fla. 2003); *In re Haque*, 334 B.R. 486, 490 (Bankr. D. Mass. 2005); *In re Reese*, 281 B.R. 735, 741 (Bankr. M.D. Fla. 2002); *In re Georgeff*, 218 B.R. 403, 406 (Bankr. S.D. Ohio 1998); *In re Bucco*, 205 B.R. 323, 324 (Bankr. M.D. Fla. 1996); *In re Hilton*, 122 B.R. 138, 139 (Bankr. M.D. Fla. 1990).

the Act limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor.⁴⁷

In the context of Chapter 13 cases, factors such as the debtor's motivation and sincerity in seeking Chapter 13 relief, are particularly relevant,⁴⁸ as the "basic purpose and spirit of Chapter 13 is rehabilitation and repayment of debt."⁴⁹

That this Debtor's conduct before and during this case is the antithesis of seeking Chapter 13 relief in good faith is shown by answers to the following questions:

Does Debtor have a long history of litigating over the Property? Yes. Has Debtor engaged in this litigation in multiple jurisdictions? Yes. Has this litigation included attempts by Debtor to relitigate issues already decided? Yes. Can Debtor's repeated attempts to relitigate the Foreclosure Judgment be considered vexatious? Yes. Does the amount of the adverse judgment in favor of Nationstar compared to other creditors render the bankruptcy effectively a two-party dispute? Yes. Has Debtor's prepetition conduct indicated an unwillingness to honor what has become his primary obligation in bankruptcy? Yes. Is Debtor a repeat filer? Yes.

⁴⁷ *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (internal quotations and citations omitted).

⁴⁸ *Tina Livestock Sales, Inc. v. Schachtele (In re Schachtele)*, 343 B.R. 661, 668 (B.A.P. 8th Cir. 2006).

⁴⁹ *In re McGovern*, 297 B.R. 650, 658 (S.D. Fla. 2003)(citations omitted).

Has Debtor failed to file a confirmable plan in this case after being in Chapter 13 for more than a year? Yes.

Does Debtor propose to make monthly payments to Nationstar or his other creditors for the requisite Chapter 13 (36-60 month) timeframe? No.⁵⁰ Does Debtor propose to devote all his net disposable income, including his income tax refunds, to his plan? No.⁵¹ Does Debtor intend to pay for insurance on the Property during the plan? No. Does Debtor intend to pay taxes on the Property during the plan? No. Does Debtor intend to reside in the Property during the plan? No. Has Debtor allowed Nationstar's appraiser access to the interior of the Property for an inspection during this case? No. Does Debtor recognize Nationstar's Foreclosure Judgment as final? No. Does Debtor's plan acknowledge the validity of Nationstar's claim? No. Does Debtor intend to stop litigating against Nationstar for the duration of his plan or even after sale of the Property? No.⁵²

⁵⁰ 11 U.S.C. § 1325(b)(4)(A) (2020). A plan may be less than three (3) or five (5) years, but "only if the plan provides for payment in full of all allowed unsecured claims over a shorter period." 11 U.S.C. § 1325(b)(4)(B) (2020).

⁵¹ 11 U.S.C. § 1325(b)(1)(B) (2020). Doc. 244.

⁵² Doc. 244, p. 2. In Section 3.4 of the Sixth Plan Debtor asserts: "The debtor intends to avoid a judicial lien or nonpossessory, nonpurchase-money security interest held by each of the creditors listed below. . . Nationstar Mortgage, LLC, amount \$544,411.15, Nature of Lien to be Avoided, Judicial Lien see Part 8." *Id.* "If the [Nationstar's] claim is in dispute after sale or when the lump sum is due, the amount of proceeds held by the court will not exceed the amount in controversy" *Id.* at p. 4.

Debtor's conduct and testimony aside, the Sixth Plan bears clear hallmarks of bad faith. In the Sixth Plan, Debtor proposes to retain the Property that he does not reside in or use, for which he has paid nothing since 2011, and for which he intends to continue paying nothing, in order to reap a windfall from an ultimate sale. Courts have found bad faith when a debtor's plan indicates an intent to derive a windfall at the expense of creditors.⁵³ Courts have also found bad faith where the plan shifts the risk of loss to one or more creditors and the debtor retains the collateral without paying for insurance, maintenance, or taxes.⁵⁴

Debtor has not cited, and the Court has not located, a single case in which a bankruptcy court has confirmed a Chapter 13 plan similar to the Sixth Plan; much less over the objection of the secured creditor and the trustee. Rather, in a case with facts remarkably similar to those in the instant case, this Court dismissed a Chapter 13 case as having been filed in bad faith.⁵⁵ In *In re Poston*, the debtor filed Chapter 13 the same day

⁵³ See *In re Kirk*, 465 B.R. 300 (Bankr. N.D. Ala. 2012) (a plan which delayed payments to the secured creditor for eight months to benefit non-creditors demonstrated a sufficient lack of good faith to preclude confirmation); and *In re Pope*, 215 B.R. 92, 93 (Bankr. S.D. Ga. 1997) (a plan which had the principal effect of reducing the amount owed to a secured claimant in order to create a windfall for the debtor was not filed in good faith).

⁵⁴ *In re Barberena*, No. 08-14946-B-13, 2009 WL 330248, at *4 (Bankr. E.D. Cal. Jan. 28, 2009) (holding that a plan funded by a property sale after one year was not proposed in good faith because debtor did not have the means to pay property taxes and insurance such that the plan improperly shifted the risk of loss to the secured creditor).

⁵⁵ *In re Poston*, 78 B.R. 308 (Bankr. N.D. Fla. 1987).

that a foreclosure sale of her non-homestead property was to take place.⁵⁶ When the debtor finally filed a plan, that plan proposed “nothing more than to attempt to sell the property which was to be sold pursuant to the judgment of foreclosure and to pay [the creditor] in full from the proceeds of the sale.”⁵⁷ Like here, the debtor in *Poston* did not propose any payments from future earnings and did not provide any payment to the foreclosing creditor.⁵⁸ This Court granted the creditor’s motion to dismiss the Chapter 13 on the basis that “there is no legitimate purpose for the Chapter 13 other than merely to delay a single secured creditor and to make him wait for a sale to be consummated before he receives anything.”⁵⁹

In a document filed after the conclusion of the evidentiary hearing, Debtor urges that his good faith is shown by the following: he shortened the plan period from sixty (60) to twenty-four (24) months, listed the Property for sale on Zillow, reduced the asking price and increased the amount he proposes to pay Nationstar from \$115,000 to \$544,411.15.⁶⁰

⁵⁶ *Id.* at 308.

⁵⁷ *Id.*

⁵⁸ *Id.* at 308-09.

⁵⁹ *Id.* at 309. This Court acknowledged that not all Chapter 13 plans that deal primarily with one or more secured debts are filed in bad faith. *Id.*

⁶⁰ Doc. 270.

While this recitation of post-petition events is true, improved conduct during the days prior to the evidentiary hearing is not enough to erase prior conduct. The timing of these events tells the true story: Debtor did finally list the Property after having been in bankruptcy for several months—but he listed it for rent; not for sale. When Debtor finally listed the Property for sale, he did so at a price \$200,000 higher than his own sworn opinion of the Property’s value. He eventually reduced the list price for the Property to \$872,000, still \$122,000 more than his opinion of its value, but did so only forty-two (42) days prior to the final hearing.⁶¹ Debtor did not shorten the plan from sixty (60) to twenty-four (24) months or raise the amount payable to Nationstar until he filed the Sixth Plan on February 3, 2020, nine (9) days prior to the final evidentiary hearing.

These recent adjustments do not demonstrate that Debtor’s goal has changed, that he has a good faith desire to restructure his financial affairs or that he seeks to benefit from a “fresh start.” Instead, they illuminate the obvious: Debtor’s primary, if not sole, goal is to own and enjoy the Property for at least another two years, at no cost to himself,

⁶¹ Debtor states that he reduced the listing price on December 31, 2019 (Doc. 203, p. 1). The final hearing took place on February 12, 2020. Per Zillow, the Property was listed for sale on May 14, 2019.

while continuing to fight Nationstar; and to benefit from a windfall upon his eventual sale of the Property.

Had Debtor shown a scintilla of remorse for his pre- and post-petition behavior, which he has not, that would not be enough. As one court put it:

[T]he debtor's degree of honest sorrow over his past behavior is largely beside the point. The pertinent question is not whether he is now sorry for [his past behavior], but whether he is intent on repaying [the creditor] as much as possible in a genuine effort at rehabilitation, or as little as possible in an effort to thwart and avoid a legitimate debt.⁶²

Having carefully reviewed the evidence, including Debtor's testimony, actions and demeanor, this Court finds unmistakable manifestations of bad faith, both in filing the petition and the Sixth Plan. For that reason, alone, confirmation is due to be denied.

The Sixth Plan is not Feasible

A debtor bears the burden of proving that a Chapter 13 plan meets the requirements of 11 U.S.C. § 1325, including that it is feasible.⁶³ Where, like here, a debtor files a plan that proposes to pay a significant portion of debt via a potential post-confirmation sale of an asset, courts

⁶² *In re McGovern*, 297 B.R. 650, 660 (S.D. Fla. 2003).

⁶³ *In re Fantasia*, 211 B.R. 420, 423 (B.A.P. 1st Cir. 1997) ("The debtor carries the initial burden of showing that the plan is feasible."); and *In re Potgieter*, 436 B.R. 739, 743 (Bankr. M.D. Fla. 2010).

have held that the circumstances of such a sale must be sufficiently defined to meet the feasibility requirement. For example in *In re Hogue*, the Bankruptcy Court for the Southern District of Ohio stated that “the debtors’ bare assertions that they will sell or refinance their residences at or near the end of their Chapter 13 plans, standing alone, plainly does not satisfy the feasibility requirement of § 1325(a)(6).”⁶⁴ The Bankruptcy Court for the Eastern District of Pennsylvania denied confirmation in *In re Erickson* because “[t]he Plan fails to specify the terms of its listing for sale. It makes no statement regarding remedies accorded to the secured creditors of [*sic*] the projected sale is unsuccessful. . . . The realty has failed to elicit an offer which the Debtors have deemed acceptable after a year on the market, and the Husband presented no evidence of any dramatic events likely to change the bleak status quo.”⁶⁵

The Debtor has the ultimate burden to prove that his proposed Chapter 13 plan meets the statutory requirements for confirmation, including feasibility.⁶⁶ While this burden is lessened when the chapter 13

⁶⁴ *In re Hogue*, 78 B.R. 867, 872 (Bankr. S.D. Ohio 1987).

⁶⁵ *In re Erickson*, 176 B.R. 753, 757-58 (Bankr. E.D. Pa. 1995).

⁶⁶ *See, e.g., In re Hill*, 268 B.R. 548, 552 (B.A.P. 9th Cir. 2001) (“The debtor, as the chapter 13 plan proponent, has the burden of proof on all elements of plan confirmation.”); *In re Heath*, 182 B.R. 557, 560 (B.A.P. 9th Cir. 1995) (“In general, the debtor carries the burden of proving, by a preponderance of the evidence, that the plan complies with the statutory requirements of confirmation.”); *In re Weisser*, 190 B.R. 453, 454 (Bankr. M.D. Fla. 1995); *In*

trustee recommends confirmation,⁶⁷ here the Trustee has made no such recommendation. Section 1325(a)(6) requires that visionary or speculative chapter 13 plans not be approved. A bankruptcy court may deny confirmation if it does not find credible the debtor's uncorroborated testimony as to the feasibility of the plan.⁶⁸

The evidence supports Nationstar's and the Trustee's suggestions that a motivated person should have sold the Property long before now, and certainly should be able to sell the Property well within the twenty-four (24) months set forth in the Sixth Plan for enough to pay Nationstar in full. But Debtor's testimony, demeanor and actions reveal that he is not motivated to sell the Property, but rather to continue his long-standing battle with Nationstar.⁶⁹

Debtor's protestation that he has demonstrated good faith by reducing the list price for the Property and increasing the amount

re Norwood, 178 B.R. 683, 687 (Bankr. E.D. Pa. 1995); *see also In re Ziegler*, 88 B.R. 67, 69 (Bankr. E.D. Pa. 1988).

⁶⁷ *See In re Hines*, 723 F.2d 333 (3d Cir. 1983).

⁶⁸ *See In re Patton*, 2007 WL 853742, at *5 (Bankr. E.D. Pa. 2007) (finding not credible uncorroborated testimony of increased income and thus finding the debtor's proposed chapter 13 plan infeasible); *In re Haskell*, 252 B.R. 236, 244 (Bankr. M.D. Fla. 2000) (chapter 13 confirmation was denied when debtor was delinquent in plan payments, debtor's testimony regarding future income was not persuasive, and two prior chapter 13 cases had been dismissed).

⁶⁹ Debtor has been litigating and attempting to prevent Nationstar from enforcing its Foreclosure Judgement entered in 2013 for approximately seven (7) years and he testified at the final hearing that he does not intend to stop.

allocated to Nationstar in the Sixth Plan is simply not true. Debtor's actions speak louder than his words: he has not listed the Property with a professional and has no intention to do so, he has not placed "for sale" signs on the property, he has not shown the Property to a single interested party, and he has not paid and does not intend to pay for taxes or insurance. In short, Debtor has presented absolutely no evidence that his Sixth Plan is feasible. For that reason, the Sixth Plan cannot be confirmed.

The Sixth Plan may not be confirmable due to its balloon payment provision.

Bankruptcy courts disagree on whether Section 1325(a)(5)(B)(iii)(I) allows Chapter 13 plans with balloon payments. Most courts to have considered the issue, including at least two Florida bankruptcy courts, have held that 11 U.S.C. § 1325 does not permit balloon payment Chapter 13 plans.⁷⁰ In *In re Spark*, the Bankruptcy Court for the Middle District of Florida agreed with a North Carolina court that "[w]hen Congress passed BAPCPA in 2005, it added the 'equal monthly amounts' language

⁷⁰ See e.g., *In re Hamilton*, 401 B.R. 539 (B.A.P. 1st Cir. 2009); *C.f. In re Cochran*, 555 B.R. 892 (Bankr. M.D. Ga. 2016). See, also, *In re Benedicto*, 587 B.R. 573, 575 (Bankr. S.D. Fla. 2018) ("The majority of courts that have considered the issue have ruled that section 1325 of the Bankruptcy Code bars confirmation of balloon-payment plans in chapter 13 cases.").

to § 1325 to prevent debtors from confirming balloon payment plans.”⁷¹ But a Georgia bankruptcy court has more recently held the opposite.⁷² One judge in the Bankruptcy Court for the Southern District of Florida has held that whether a balloon payment will be permitted is left to the sound discretion of the court.⁷³

Based on the facts here, it is unnecessary to rule on the global issue of whether the Sixth Plan is unconfirmable because of its balloon payment provision. For other reasons, the Sixth Plan does not comply with the requirements of the Bankruptcy Code and cannot be confirmed.

Stay Relief in favor of Nationstar.

Section 362(d) of the Bankruptcy Code, under which Nationstar seeks stay relief, provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section . . . (1) *For cause, including the lack of adequate protection of an interest in property . . .* .; (2) with respect to a stay of an act against property under

⁷¹ *In re Spark*, 509 B.R. 728, 730 (Bankr. M.D. Fla. 2014) (citing *In re Hill*, 397 B.R. 259, 270 (Bankr. M.D.N.C. 2007)).

⁷² *In re Cochran*, 555 B.R. 892 (Bankr. M.D. Ga. 2016).

⁷³ *In re Ramirez*, NO 13-20891-AJC, 2014 WL 1466212, at *3-4 (Bankr. S.D. Fla. April 7, 2014). Debtor’s reliance on *In re Gregory*, 143 B.R. 424 (Bankr. E.D. Tex. 1992), is misplaced. In *Gregory*, the court confirmed a balloon payment plan based on the debtors’ future sale of their homestead because the only secured creditor, IRS, supported confirmation. The debtors in *Gregory* had not been litigating the IRS claim for years, this was their first Chapter 13 case, and there was no evidence that the debtors intended to litigate or contest the IRS claim during the pendency of the plan. The court in *In re Gregory* noted that “by its own terms, § 1322(a)(2) waives the requirement of periodic payments *if the holder of the claim so consents.*” *Id.* at 426-427 (emphasis added).

subsection (a) of this section, if— (A) the debtor does not have equity in such property; *and (B) such property is not necessary to an effective reorganization . . .*.⁷⁴

“Cause” for purposes of 11 U.S.C. § 362(d) has been defined to include bad faith in filing a bankruptcy petition, which must be determined on a case by case basis.⁷⁵ As this Court has noted,

Although difficult to define, the requirement of good faith is of supreme importance when ruling on the issue of confirmation plans [*sic*]:

Confirmation of a Chapter 13 plan requires the exercise of judicial discretion and assessment of evidence by a bankruptcy judge. The good faith requirement is one of the central, perhaps the most important confirmation finding to be made by the court in any Chapter 13 case.⁷⁶

This Court having determined that Debtor filed this case and his Sixth Plan in bad faith, cause exists to grant Nationstar’s Stay Relief Motion.

In opposition to stay relief, Debtor argues that the value of the Property provides enough of an equity cushion that stay relief is not warranted. But equity in the Property, alone, is insufficient to preclude stay relief if the debtor does not have a reasonable prospect of an effective reorganization.

⁷⁴ 11 U.S.C. §§ 362(d)(1), (2) (2020)(emphasis added).

⁷⁵ See e.g., *In re Schaffer*, 597 B.R. 777, 789 (Bankr. E.D. Pa. 2019).

⁷⁶ *In re King*, 131 B.R. 207, 209 (Bankr. N.D. Fla. 1991) (citations omitted).

The Eleventh Circuit has stated:

Regarding the second element, we have said that property is “necessary to an effective reorganization” only when a debtor “demonstrate[s] that an effective reorganization is realistically possible; the mere fact that the property is indispensable to the debtor’s survival is insufficient.”⁷⁷

A debtor has the burden to establish that the subject property is necessary to an effective reorganization.⁷⁸ Here, Debtor has failed to demonstrate that an effective reorganization is possible; in fact, he has amply demonstrated that he has no genuine intent to reorganize his financial affairs. Having found the Sixth Plan is not feasible, the Property cannot be necessary to an *effective* reorganization and so stay relief is appropriate.

CONCLUSION

The totality of the circumstances, the unrefuted facts, and the witnesses’ testimony and demeanor reveal that Debtor’s bankruptcy case and Sixth Plan were not filed in good faith. While there may be equity in the Property, the value of the Property is not enough to override the

⁷⁷ *In re Bagwell*, 741 Fed. Appx. 755, 759 (11th Cir. 2018) (citing *In re Albany Partners, Ltd.*, 749 F.2d 670, 673 (11th Cir. 1984)).

⁷⁸ *In re A-1 Management Corp.*, No. 11-30042-BKC-AJC, 2011 WL 5509262, *3 (Bankr. S.D. Fla. Nov. 10, 2011).

conclusion that the Sixth Plan is not confirmable and that the Property is not necessary to an effective reorganization.

The Court will issue separate orders denying confirmation of the Sixth Plan and granting Nationstar's Amended Motion for Relief from Stay consistent with these Findings of Fact and Conclusions of Law.

DONE AND ORDERED on April 6, 2020.

A handwritten signature in black ink, appearing to read 'K. Specie', written over a horizontal line.

KAREN K. SPECIE
Chief U. S. Bankruptcy Judge

cc: all parties in interest, including
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